

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RONALD KEAL *et al.* ,

Plaintiffs,

v.

THE STATE OF WASHINGTON, *et al.*,

Defendants.

Case No. C05-5737RJB

REPORT AND
RECOMMENDATION

**NOTED FOR:
JUNE 29, 2007**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Defendants moved for summary judgment and the court entered a Report and Recommendation that recommended granting in part and denying in part the summary judgment motion (Dkt. # 240). This matter is before the court on re-referral.

STEVEN WEED

One of the claims involved a November 17 2003, use of force. The only defendant named in this

1 claim is Steven Weed. The plaintiff asserting this claim is Mr. Keal. The court recommended the motion
2 be denied as the motion did not address this particular claim (Dkt. # 240).

3 Defendants objected and argued this claim was dismissed in a pervious Order. That Order
4 adopted a prior Report and Recommendation where the court found the use of force claim against Steven
5 Weed was unexhausted (Dkt. # 244, citing to Dkt. # 162 (Report and Recommendation pages 9 to 14)).

6 The parties have been allowed to submit additional briefing (Dkt. # 254, 255, 258). Defendants
7 show that the use of force claim against Steven Weed was dismissed as unexhausted. In August of 2006
8 this court methodically examined grievances filed by Mr. Keal and determined the only use of force
9 claim he had exhausted arose out of an allegation of use of force occurring on February 2, 2004. This
10 use of force did not involve Steven Weed. All other use of force claims were dismissed as
11 unexhausted (Dkt. # 176 (Order adopting Report and Recommendation)). Plaintiff included this
12 claim against Steven Weed in a subsequent amended complaint even though it had been dismissed
13 (Dkt. # 183).

14 In response to defendant's supplemental briefing, plaintiffs now argue the claim against
15 Steven Weed was exhausted because Mr. Keal could not file a grievance on an issue where he had
16 received an infraction (Dkt. # 255). Plaintiffs cite to WAC 137-28-260 *et. seq.* for this proposition
17 (Dkt. # 255 page 1). This section of the Washington Administrative Code does not support
18 plaintiff's argument. WAC 137-28-260 is a list of serious infractions. Plaintiffs argue Mr. Keal filed
19 his grievance when his infraction was dismissed on December 29, 2003 and the grievance was held to
20 be untimely (Dkt. # 255).

21 Defendants reply and note that Mr. Keal could not file a grievance over receiving an
22 infraction or regarding the sanctions from a guilty finding. This is because the discipline process is
23 covered by its own appeal process. Nothing prevented plaintiff from filing a staff misconduct
24 grievance regarding Steven Weeds use of force in November 17, 2003 (Dkt. # 258, page 2).
25 Defendant's position is supported by evidence previously placed in the record, (Dkt # 137, Exhibit 1
26 ¶ 4 and 5 affidavit of Devon Schrum, page 2). Thus, this claim is unexhausted.

27 The Prison Litigation Reform Act of 1995 (PLRA), amended 42 U.S.C. § 1997e(a), requires
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1 a prisoner to exhaust "such administrative remedies as are available" before suing over prison
2 conditions. This exhaustion requirement applies to virtually all federal claims brought by prisoners.
3 Porter v. Nussle, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all
4 inmate suits about prison life, whether they involve general circumstances or particular episodes, and
5 whether they involve excessive force or some other wrong doing."). The exhaustion requirement is
6 mandatory, and cannot be waived, even when the process is futile or inadequate. Booth v. Churner,
7 532 U.S. 731, 741 (2001). Thus, this claim cannot proceed. Defendant Weed is entitled to dismissal.

8 GALE MUNDEN AND BOB MOORE

9 Also raised in the plaintiff's briefing is an issue regarding service of process on two
10 defendants. These two persons are Gale Munden and Bob Moore (Dkt. # 255). In March of this
11 year the court entered an order adopting a Report and Recommendation (Dkt. # 252). The
12 Honorable Judge Bryan addressed the service issue and stated "plaintiffs should be afforded an
13 opportunity to effect service on these defendants and to demonstrate why the case should not be
14 dismissed for failure to prosecute as to these defendants." Plaintiff was ordered to show cause why
15 claims against Munden and Moore should not be dismissed for failure to prosecute and to effect
16 proper service (Dkt. # 252, page 19).

17 Normally a person has 120 days to serve the defendants. Federal Rule of Civil Procedure 4
18 (m) indicates that if service of a summons and complaint is not made within 120 days of filing the
19 court shall dismiss without prejudice unless the plaintiff can show good cause why service was not
20 made within that time. Ignorance of the rules is not good cause. Townsel v. County of Contra
21 Costa, 820 F.2d 319, 320 (9th Cir.1987). This case was filed November 14, 2005. To date no proff
22 of service has been filed.

23 The above analysis and a plain reading of the rule would appear to indicate that dismissal
24 without prejudice is in order, but the standard of review is abuse of discretion which indicates the
25 court has discretion in deciding if dismissal is proper. Wei v. State of Hawaii, 763 F.2d 370, 371
26 (9th Cir. 1985).

27 The 9th Circuit has indicated that failure to comply with the service requirements does not

1 mandate dismissal and the rule should be given liberal and flexible construction as long as the
2 defendant receives sufficient notice of the complaint. United Food & Commercial Workers Union v.
3 Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984). Failure to follow technical requirements does
4 not warrant dismissal where “(a) the party that had to be served personally received actual notice, (b)
5 the defendants would suffer no prejudice from the defect in service, (c) there is a justifiable excuse
6 for failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were
7 dismissed.” Borzeka v. Heckler, 739 F.2d 444, 447 (9th Cir. 1984).

8 Plaintiffs respond and indicate they believe the defendants were served. They cite to Dkt. #
9 84. Dkt. # 84 is an order directing service be attempted on four other defendants. It does not
10 indicate any defendant has received service by mail and waived formal service. Plaintiffs have failed
11 to show good cause for not effecting timely service on these two persons. Defendants Munden and
12 Moore should be dismissed from this action **Without Prejudice**. A proposed order accompanies
13 this Report and Recommendation.

14 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
15 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.
16 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
17 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
18 72(b), the clerk is directed to set the matter for consideration on **June 29, 2007**, as noted in the
19 caption.

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21 DATED this 5, day of June, 2007.
22

23
24 /S/ J. Kelley Arnold
25 J. Kelley Arnold
26 United States Magistrate
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